Supreme Court, U.S.
FILED
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No. 95-611

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Daniel F. George and Michael Mulvey,
Individually and as police officers
of the City of Worcester,
Petitioners,

v.

Joseph F. Consolo,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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November 1995

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INTRODUCTION

In an example par excellence of the maxim that the best defense is a good offense, Respondent Joseph F. Consolo's Brief in Opposition ("Opp. Br.") adopts a stunning tactic. That tactic is to coronate the trial court's definition of "deliberate indifference" as "unassailable." (Opp. Br., at 10.) Indeed, in what is assuredly news to George and Mulvey, the trial court's definition is "one with which even the petitioners have no complaint." (Opp. Br., at 10.) In

essence, Consolo's tactic blithely charges that, because George and Mulvey's Petition presents no viable legal issues, it is relegated to simply taking "a fourth bite at the evidentiary apple" by retreating "to the thrice-failed scenario that Mr. Consolo was performing for the [police booking] camera." (Opp. Br., at 2, 6.)

George and Mulvey present no such scenario to this Court. Consolo's Brief in Opposition is a victim of taking its own blithe tactic too seriously, failing as it does to provide any meaningful analysis of the Petition's legal issues which are of constitutional importance to municipalities and their police officers nationwide. Instead, Consolo's Brief in Opposition raises three (3) new but erroneous points, as will now be demonstrated.

ARGUMENT

I. This Case Is The Fourteenth Amendment Counterpart To Farmer v. Brennan, Not, As Respondent Asserts, To Canton v. Harris.

The first new point in Consolo's Brief in Opposition to the Petition for a Writ of Certiorari is embraced by his question, "IS THIS CASE THE FOURTEENTH AMENDMENT COUNTERPART TO CANTON V. HARRIS?" (Opp. Br., at 9.) Consolo answers that this case is not "a suitable vehicle for expanding Canton v. Harris to Fourteenth Amendment-pretrial detainees." (Opp. Br., at 11.)

At best, Consolo's Q & A grossly misreads the issue expressly presented by George and Mulvey's Petition (at 13-19): that Consolo presents itself as the Fourteenth Amendment counterpart to Farmer

v. Brennan, ___ U.S. ___, 114 S. Ct. 1970 (1994), and its Eighth Amendment definition of "deliberate indifference" as recklessness in the criminal-law sense.

At worst, Consolo's Q & A betrays a radical misunderstanding of Canton v. Harris, 489 U.S. 378 (1989). In Canton, this Court held "that a municipality can be liable for failure to train its employees when the municipality's failure shows 'a deliberate indifference to the rights of its inhabitants.'" Farmer v. Brennan, ___ U.S. at ___, 114 S. Ct. at 1980 (quoting Canton, 489 U.S. at 389). But Canton's holding merely interpreted municipal failure-to-train liability under 42 U.S.C. § 1983, id., a statute "which merely provides a cause of action" and which, therefore, "'contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.'" Id. at ___, 114 S. Ct. at 1981 (quoting Daniels v. Williams, 474 U.S. 327, 330 (1986)). Indeed, Canton explicitly left open the state-of-mind question whether the Eighth Amendment's definition of "deliberate indifference," or something less, applies to a pretrial detainee's Fourteenth Amendment due process right to medical care. 489 U.S. at 388 n.8.

Thus, Consolo fails to "bear in mind Chief Justice Marshall's admonition that 'we must never forget, that it is a constitution we are expounding.'" Daniels, 474 U.S. at 332 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)(emphasis in original)). Prior to Farmer v. Brennan, this Court had never paused to expound upon the constitutional meaning of the term "deliberate

indifference." Id. at ___, 114 S. Ct. at 1977-78. That case offered the Court the opportunity to do so within the meaning of the Eighth Amendment. This case offers the Court the same opportunity to do so within the meaning of the Fourteenth Amendment. Consolo's conspicuous failure to cite Farmer v. Brennan -- not even once -- shows his desire that the Court not seize that opportunity, even as it seized it in Farmer v. Brennan.

II. This Case Presents A Certworthy Question As To The Conflict Among The Circuits Regarding The Proper Fourteenth Amendment Standard To Apply To Pretrial Detainee Claims Of Inadequate Medical Care, A Question In Which, Contrary to Respondent's Assertion, Petitioners Have A Stake.

Consolo's second new point is that this Court should deny certiorari because George and Mulvey have no stake in the conflict among the circuits as to the proper Fourteenth Amendment standard to apply to pretrial detainee claims of inadequate medical care. This, assertedly, is because George and Mulvey benefited "from any failure of the courts below to apply a standard more protective of pretrial detainees," such as the Fifth Circuit's reasonable medical care standard in Hare v. City of Corinth, MS., 36 F.3d 412 (5th Cir. 1994). (Opp. Br., at 12-13.)

Consolo's point is off-point. Supreme Court Rule 10(a) provides that one of the compelling reasons for which this Court may discretionarily grant certiorari is when:

> a United States court of appeals has entered a decision in

> conflict with the decision of another United States court of appeals on the same important matter....

Thus, the Court granted certiorari in Farmer v. Brennan, ___ U.S. ___, ___, 114 S. Ct. 1970, 1976 (1994), "because Courts of Appeals had adopted inconsistent tests for 'deliberate indifference'" within the meaning of the Eighth Amendment. Precisely the same reason, albeit in the Fourteenth Amendment context, applies to Consolo, because the First Circuit has adopted a test inconsistent with the Fifth Circuit's test.

Moreover, contrary to Consolo's assertion, George and Mulvey did not benefit "from any failure of the courts below to apply a standard more protective of pretrial detainees." Rather, because such a standard was applied, they were aggrieved. The First Circuit viewed the jury instruction in Consolo as consistent with its earlier opinion in Manarite v. Springfield, 957 F.2d 953 (1st Cir. 1992). But while Manarite defined "deliberate indifference" as recklessness, that definition was held insufficient by this Court in Farmer v. Brennan, precisely because recklessness is not self-defining. ___ U.S. at ___, 114 S. Ct. at 1978 (citing, in part, Manarite, 957 F.2d at 957). George and Mulvey could hardly have benefited from a "deliberate indifference" jury instruction based on an insufficient definition of recklessness, inasmuch as such a definition diluted the standard of proof at trial.

Nor is the conflict between the First and the Fifth Circuits merely an

"interesting" one. (Opp. Br., at 14.) The jury instruction in Consolo containing the insufficient definition of "deliberate indifference" was, Consolo concedes, based on the Eighth Amendment case, Estelle v. Gamble, 429 U.S. 97 (1976). (Petition, at 29-31.) This fact immediately injects Eighth Amendment considerations into the Fourteenth Amendment Consolo case. It also puts Consolo at odds with the Fifth Circuit which, in Cupit v. Jones, 835 F.2d 82 (5th Cir. 1987), rejected the Estelle standard in the context of medical claims by pretrial detainees and held:

> pretrial detainees are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective.

Id. at 85. In so holding, the Fifth Circuit relied on this Court's opinion in Bell v. Wolfish, 441 U.S. 520 (1979), that:

> if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal -- if it is arbitrary or purposeless -- a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Id. at 539 (footnote omitted). "Significantly," the 1979 Bell opinion makes no mention of the 1976 Estelle standard of "deliberate indifference." Grabowski v. Jackson County Public Defenders Office, 47 F.3d 1386, 1395 (5th Cir. 1995). Thus, the conflict between the First Circuit and the Fifth Circuit is identical to the conflict between Estelle and Bell, respectively. And, while George and Mulvey would contend that Farmer v. Brennan's refinement of the Estelle standard of "deliberate indifference" under the Eighth Amendment should also govern under the Fourteenth Amendment, the Fifth Circuit opines otherwise. Grabowski, 47 F.3d at 1397 n.19.

Therefore, the certworthy question posed by this circuit conflict -- the resolution of which George and Mulvey certainly have a stake in -- is: does the Fourteenth Amendment require that the governmental actor's state of mind be shown to be reckless in the criminal-law sense, or does it not? For example, the answer offered by the Seventh Circuit is that "only intentional or criminally reckless conduct in the medical treatment of a pretrial detainee -- that is, deliberate indifference to the detainee's serious medical need -- violates due process." Salazar v. City of Chicago, 940 F.2d 233, 239 (7th Cir. 1991)(construing Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986)). This Court has consistently been in harmony with Seventh Circuit precedent in crafting its Eighth Amendment "deliberate indifference" opinions. See, e.g., Farmer v. Brennan, ___ U.S. at ___, 114 S. Ct. at 1991 (Thomas, J., concurring in the judgment)("the Seventh Circuit has long

followed the rule of law the Court lays down today" regarding "deliberate indifference")(citing, in part, Duckworth v. Franzen). No evidence existed at trial that George and Mulvey criminally intended to inflict punishment upon, "to chastise or deter," Consolo. Duckworth v. Franzen, 780 F.2d at 652. Reliance on Seventh Circuit precedent in the case at bar would mean that George and Mulvey did not have the state of mind constitutionally required to violate the Fourteenth Amendment.

III. Petitioners' Right To Challenge The First Circuit's Erroneous Rulings On The "Deliberate Indifference" Jury Instruction And On Qualified Immunity Remains Alive, Contrary To Respondent's Assertion.

Consolo's third new point is that George and Mulvey did not preserve their rights, and thus lack the standing, to challenge the errors contained in the First Circuit's decision. (Opp. Br., at 11-12, 16.) However, George and Mulvey argued to the First Circuit, and continue to argue, that the jury instruction on "deliberate indifference" was plain error resulting in a clear miscarriage of justice which seriously affected the fairness and integrity of the trial. See, e.g., Transnational Corp. v. Rodio & Ursillo, Ltd., 920 F.2d 1066, 1069 (1st Cir. 1990). Although ultimately finding no plain error, the First Circuit took this argument seriously and analyzed the jury instruction. In contrast, Consolo's conspicuous failure to cite -- not even once -- the very case upon which his jury instruction on "deliberate indifference" was based, Estelle v. Gamble, 429 U.S. 97 (1976), betrays his concern that this Court

engage in that analysis.

Likewise, Consolo fails to come to grips with the qualified immunity issue. Even the First Circuit acknowledged in Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87 (1st Cir. 1994), that which it failed to acknowledge later in Consolo: that no clear constitutional guideposts yet exist as to the precise nature of the due process duty which police must satisfy in according medical care to pretrial detainees. 14 F.3d at 94 n.10 (citing Canton v. Harris, 489 U.S. 378, 388 n.8 (1989)). Consolo furnishes this Court with the appropriate implement to erect that constitutional guidepost.

CONCLUSION

For the aforementioned reasons, and for the reasons set forth in their Petition for a Writ of Certiorari, George and Mulvey respectfully urge this Court to grant their Petition.

Respectfully submitted,

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Dated: November, 1995